FU KAU CHERNG & ANOR

v.

CHEW KEAN CHONG

HIGH COURT MALAYA, IPOH
KANG HWEE GEE J
[CIVIL SUIT NO: 22-7-1991]
29 MARCH 1997

LAND LAW: *Sale of land - Breach - Balance of purchase price not paid - Purchaser moving into occupation upon execution of agreement - Termination of agreement - Purchaser's license to occupy cancelled - Purchaser refusing to vacate premises - Claim for vacant possession and damages for wrongful occupation and trespass*

LAND LAW: *Sale of land - Deposit - Whether could be forfeited - Definition of "Deposit"*

The plaintiffs and the defendant entered into a sale and purchase agreement for the sale of a bungalow house together with the land thereon. The house straddled two pieces of land and by a supplementary agreement, the parties agreed to amalgamate and subdivide the land and the defendant would then obtain a subdivided new title subsequent to approval by the authorities. However the defendant failed to pay the balance of the purchase price within the time stipulated in the agreement and the plaintiffs deemed the agreement to have been terminated. The defendant had moved into the premises upon the execution of the agreement and had refused to deliver vacant possession of the premises upon termination of it. The defendant agreed to enter into a new agreement but failed again to comply with payment of the balance purchase price. The plaintiffs thus sought an order for vacant possession and damages for wrongful occupation and trespass.

The defendant argued that the balance of the purchase price was not paid because the title to the house was not available for his use to obtain a bank loan and contended that the agreement provided that the sale was subject to him obtaining a bank loan for the purchase. It was contended that in addition to the amount paid to the plaintiffs, the defendant had paid another sum of RM50,000 for the purchase. The defendant then counterclaimed for recission of the agreement, damages for breach of contract, refund of the total sum paid to the plaintiffs under the agreement and the cost of renovations of the premises.

Held:

[1] It was clear that only RM31,000 had been paid by the defendant to the plaintiff as the defendant could not substantiate the other payment of RM50,000 by any receipt or documents. In any event, the further payment was not consistent with the scheme of payments under the terms of the agreement which raised the question of why and under what circumstances the payment was made.

[2] At the time that the defendant claimed he renovated the house he was aware that the purchase of the house had not been fully paid for and that there was an ongoing dispute with the plaintiffs. It was clear that the renovation could not have been induced by the conduct of the plaintiffs. In those circumstances with only the bare assertion of the defendant on the sums expended for renovation, the defendant's claim for the cost of such renovation must necessarily fail.

[3] As time was of the essence in the agreement, the failure to pay the balance purchase price constituted a breach of the fundamental terms of the contract which entitled the plaintiffs to terminate the agreement. It was also clear that the sale was not conditional on the success of the defendant obtaining a loan from a financial institution. The term pertaining to the bank loan in the agreement must be construed as merely permitting the defendant to charge the property for the purpose of financing his purchase only if and when the title was available subsequent to the amalgamation and subdivision.

[4] The word "deposit" is used merely to describe the money that has been paid towards the purchase price of a property to which a purchaser who repudiates the sale and purchase agreement has no right to recover. In the present case, as the agreement did not provide that the deposit was recoverable, the payments must of necessity be forfeited to the plaintiffs.

[Plaintiffs' claim allowed with costs. Plaintiffs' damages to be assessed; defendant's counterclaim dismissed with costs.]

Cases referred to:
HG Warren v. Tay Say Geok & Ors [1965] 31 MLJ 44 ***(refd)***
Howe v. Smith [1884] 27 Ch D 89 ***(refd)***
Webb v. Hughes [1870] LR 10 Eq 281 ***(refd)***
Wong Kup Sing v. Geram Rubber Estate Ltd [1969] 1 MLJ 245 ***(refd)***

For the plaintiffs - Yeow Khoon Kwong; M/s Yeow & Co
For the defendant - Choy Kam Lee; M/s KL Choy & Co

Reported by Satish Nair

JUDGMENT

Kang Hwee Gee J:

The Facts In Brief

By a sales and purchase agreement dated 5 September 1983 the plaintiffs agreed to sell to the defendant a bungalow house together with the land thereon. The house however, was erected on two adjoining pieces of land – Lot 12291s and Lot 8027s (respectively on land held under H.S. (D) Ka 903/77 and H.S. (D) Ka 873/72).

Now, Lot 8027s was an odd elongated narrow rectangle which abutted onto the sides of 2 other adjoining pieces of land belonging to two other proprietors. It became necessary for the parties to enter into another supplementary agreement on the same day, whereby they acknowledged in the preamble that the plaintiffs had applied to amalgamate the 2 lots of land on which the house stood into a single lot and then to subdivide it into 3 lots as shown on the plan enclosed in the supplementary agreement. It was agreed by this supplementary agreement that the defendant would ultimately obtain a subdivided title to the land corresponding to the rectangle marked in bold lines in the plan together with the house, after the approval of the amalgamation and subdivision. The other 2 lots marked A and B in the plan would be transferred to the two respective proprietors of the adjoining pieces who had agreed to purchase them from the plaintiff by a separate agreement.

The application for amalgamation and subdivision was subsequently approved and a new title was issued in 1984 for the land on which the house now stands.

Why the solicitor who advised the parties chose to create two agreements when all the terms and conditions and obligations could have been more conveniently incorporated into one is difficult to comprehend. Both the main and the supplementary agreements contain inter alia the following relevant similarly worded and identical clauses which for ease of reference I will now reproduce as follows:

Clause 2 - The price shall be the sum of $151,000 (ringgit one hundred and fifty one thousand).

Clause 3 - The purchaser shall on the execution of this agreement pay the Owners the sum of $1,000 (ringgit one thousand) the receipt of which said sum of $1,000 the Owners hereby acknowledge.

Clause 4 - The balance of the purchase price of $150,000 (ringgit one hundred and fifty thousand) shall be paid in the following manner:

(a) The sum of $30,000 (ringgit thirty thousand) shall be paid on 15 day of September 1983;

(b) The balance of the purchase price of $120,000 (ringgit one hundred and twenty thousand) shall be paid on the release of the loan from a bank or a financial institution or on 15 October 1983 whichever shall be the earlier date.

Clause 8 - Time wherever mentioned shall be of the essence of this agreement.

Clause 10 - Notwithstanding anything herein contained the balance of the purchase price shall be paid immediately upon the approval of a loan to the Purchaser by a Bank or financial instituion for the purchase of the said property and the Purchaser shall take up such loan immediately upon approval of the same.

Clause 11 - The Purchaser shall be entitled to charge the said property as security for a loan to finance the purchase of the same and the Owners shall sign and execute all charges, documents, and other instruments relating to the same provided that the difference between the balance of the purchase price and the sum loaned by the Bank or financial institution shall have been paid by the purchaser to the Owners. All the costs of and incidental to the charge shall be borne and paid by the Purchaser.

Clause 14 - Any notices under this agreement shall be in writing and shall be deemed to have been sufficiently served if sent by prepaid registered post to the parties hereto at the above addresses.

The defendant had complied with cl. 4(a) of the agreements by paying the sum of $30,000 by 15 September 1983 but failed to comply with cl. 4(b) which requires him to pay the balance sum of $120,000 by 15 October 1983 although he had already entered into possession of the house and has since been residing therein by virtue of the provision in cl. 6 of both agreements which allowed him to do so upon signing.

The Plaintiffs' Claim

By this suit the plaintiffs' claim against the defendant for:

(a) Vacant possession of the said lands and house,

(b) An order that the plaintiffs be put into possession of the said lands and house by the sheriff or other proper officer of this Court.

(c) Damages for wrongful occupation and trespass.

(d) Costs of this action.

Evidence

According to the 1st plaintiff, Fu Kau Cherng, (PW1) he had informed the defendant orally that since the defendant had failed to pay the balance of the purchase price of $120,000 within the time agreed, the agreements had been terminated. However, as the defendant informed him that he still wanted to buy the house, he proposed that they enter into a new agreement to which the defendant had agreed. He then instructed their solicitors to prepare the new agreement and to invite the defendant by a letter (exh. P2) dated 13 May 1985, to sign a new sales and purchase agreement which read as follows:

YKK/G-6/IP/84 13th May, 1985

Mr. Chew Kean Chong,
No. 25-A, Market Street,
lpoh.

Dear Sir,

Re : H.S.(D) Ka 903/77 Lot 12291-S and
H.S.(D) Ka 873/72 Lot 8027-S
Town of Ipoh

We act for Mr. Fu Kau Cherng and Madam Foo Meow Lan of No. 10, Jalan Foo Khan Yit, Ipoh.

We are instructed by your clients to and which we hereby do give you notice that you have to call at our office on 17th May 1985 at 11.00 a.m. to sign the sale and purchase agreement and to pay the agreed purchase price for the captioned lands.

Please note that unless the agreement is executed and payment made by 17th May, 1985, you must forthwith deliver up vacant possession of the premises No. 2, Lorong Pinji, Ipoh which you now occupy as licensee of our clients.

Yours faithfully,
Sgd.

c.c. Mr. Fu Kau Cherng,

YKK/el

Receiving no reply from the defendant by 17 May 1985, their solicitors were instructed to follow up by a letter dated 24 May 1985 (exh. P3) which read as follows:

YKK/G-6/1P/84 24th May, 1985

Mr. Chew Kean Chong,
No. 25-A, Market Street,
Ipoh,

Dear Sir,

Re : H.S. (D) Ka 903/77 Lot 12291-S and
H.S. (D) Ka 873/72 Lot 8027-S
Town of Ipoh

We are to refer you to the above and to our letter dated 13th May, 1985 to you.

We regret to say that since you have failed to call at our office to execute the sale and purchase agreement and to pay the purchase price for the captioned lands, our clients have now instructed us to and which we hereby do cancel your licence to occupy premises No. 2, Lorong Pinji, Ipoh.

You are hereby required to deliver up vacant possession by delivering the keys of the said premises to us by 28th May, 1985, failing which legal proceedings will be commenced against you for damages for trespass.

Yours faithfully,
Sgd.

c.c. clients.

YKK/el

A reply dated 11 July 1985 (encl. 3 in PB) was received from the defendant only after the plaintiffs' second letter. It read as follows:

Your Ref: YKK/G-6/IP/84

Chew Kean Chong
25-A, Market Street,
1poh.
11th July, 1985.

Dear Sirs,

Re : H.S. (D) Ka 903/77 Lot 12291-S and
H.S. (D) Ka 873/72 Lot 8027-S,
Town of Ipoh

Your letter dated 13th May, 1985 which a copy was given to me by Mr. Wong of Mr. Fu Kau Cherng's office on 26th June, 1985.

I would suggest that the Sale and Purchase agreement shall not be executed as my housing loan to Southern Finance Co. Sdn. Bhd., Ipoh has been approved in principle with an adequate sum to pay the balance of the purchase price due to your clients.

I further inform you that the solicitors of the said finance company will write to you to confirm an undertaking to pay the balance of the purchase price.

After my receipt of your letter, I have approached the manager of the said finance company and found that he is on leave until 22nd July, 1985.

As such, action on this matter would be carried out immediately on the return for works of the said finance company's manager.

Any delay in attending to the above matter is deeply regretted.

Thank you,

Yours faithfully,
t.t.
(CHEW KEAN CHONG)

c.c. Mr. Fu Kau Cherng.

According to the defendant Chew Kean Chong (DW1) he did not pay the balance of the purchase price because the title to the house was not available for his use to obtain a bank loan – the plaintiffs application for the amalgamation and subdivision had not been approved at the time and presumably the original title had been submitted to the state authority. He claimed that cl. 14 of both the agreements clearly provides that the sale of the property was subjected to him obtaining a bank loan. Further, he claimed that the 1st plaintiff had informed him at the time of signing the agreement that he would get the amalgamation and subdivision of the land completed before the dateline for the balance of the purchase price. Upon his failure to obtain a bank loan he had instructed his solicitors to write to the plaintiffs on 1 December 1983 proposing that the sales and purchase agreement be rescinded following which he would deliver vacant possession of the house to the plaintiffs provided all the payments he had made was refunded to him. The letter read as follows:

Ng Yook Woon, Andrew, T.C. Saw & Company

Our Ref: C 354/8

IPOH 1st December, 1983.

M/s Foo Meow Lan &
Fu Kau Cherng
10, Jalan Foo Kan Yik
Ipoh.

Without Prejudice

Dear Sirs,

Re : H.S. (D) Ka 903/77 for Lot No. 12991S and H.S. (D) Ka 873/72 for Lot No. 8027S both in the Township of Ipoh, District of Kinta, State of Perak

Mr. Chew Kean Chong of 25A, Market Street, Ipoh, Perak has requested us to write to you as follows:

Pursuant to the letter dated 27th October, 1983 from Kwong Yik Finance Berhad to Mr. Chew, a copy of the said letter is enclosed herewith for your easy reference, the Finance has requested Mr. Chew's application for a loan to pay off the balance of the purchase price of the above property in accordance with 4(b) of the Sale and Purchase Agreement of the said property dated the 5th day of September, 1983 between yourselves of the one part and Mr. Chew of the other part.

Mr. Chew has requested us to enquire from you since his various efforts to apply for a loan to pay off the balance of the purchase price of the above property, whether you are willing to rescind the said sale and purchase agreement with Mr. Chew.

In that event, Mr. Chew has consented to pay all expenses up to including the fees for rescission of the agreement and Mr. Chew would be willing to deliver vacant possession of the said property at your earliest convenience and you will have to refund all the payments of monies already paid to you.

We shall be glad to have your reply at your earliest convenience.

Yours faithfully,

c.c.
Chew Kean Chong,
25A, Market Street,
Ipoh.

nsm.

He refused to sign the new agreement proposed by the plaintiffs because the price of the house had been increased by RM20,000. To him the old agreements were still in force since the plaintiffs had failed to return the sums he had paid (which he called deposits).

Since taking possession of the house, he had spent about RM30,000 renovating it.

He had in fact paid a total of RM81,000 to the plaintiffs through their solicitor Ng Yook Woon & Co. and not RM31,000 as alleged by the plaintiff. The further sum of RM50,000 was paid to the solicitor by his wife's cheque of RM40,000 and RM10,000 by his own cheque. He called his wife Wong Ah Mooi (DW2) to give evidence that she gave a cheque of RM40,000 to him at the solicitor's office for the purpose of buying the house. But the solicitor Ng Yook Woon (DW3) who was also called to give evidence, could not recollect if he had received the RM50,000. He said he had since moved office and would not have any record of the payment although in the normal course of business, he would issue receipts for such payment.

In the event the defendant counterclaims for,

(a) Rescission of the agreements with the plaintiff;

(b) Damages for breach of contract;

(c) Refund of the sum of RM80,000 paid to the plaintiffs under the agreement;

(d) The sum of RM35,000 spent on renovation.

Findings

After hearing the evidence on both sides and the submissions of counsel, I find as follows:

Actual Sums Received By The Plaintiffs

It is clear that only RM31,000 had been paid by the defendant to the plaintiffs through their solicitors, as the defendant could not substantiate the further payments of RM50,000 by any receipts or other documents. Also the RM50,000 payment is not consistent with the scheme of payments under cll. 3 and 4 (a) and (b) of the agreements, which raises the question of why and under what circumstances the payment of RM50,000 was made.

Sums Expended On Renovation

Clearly this has not been proved apart from the bare assertion on the part of the defendant. But even assuming that he had in fact expended the sum, I fail to see how as he could proceed to renovate the house when he knew very well that the sale and purchase of the house had not been fully paid for and there was an ongoing dispute with the plaintiff. It is clear that the renovation if any could not have been induced by the conduct of the plaintiffs that the contract was still subsisting as pleaded in para. 16 of the defence.

Who Was In Breach Of The Agreements

It is clear that the defendant had failed to pay the balance sum of RM120,000 by 15 October 1983 as required under cll. 4(b) of the agreements.

As time was of the essence in both the agreements (cl. 8), the failure to pay constitutes a breach of the fundamental terms of the contract which entitled the plaintiffs to terminate the agreements.

It was submitted by counsel for the defendant that by reason of the failure of the plaintiff to give a written notice to terminate the agreement,

1. the agreements had not been terminated,
2. the stipulation in the agreements that time was of the essence would be nullified,
3. the plaintiffs would be prevented from insisting on his right to payment of the balance sum by 15 October 1983 under cl. 4(b) of the agreements.

I do not agree. Nowhere was it stipulated that a written notice (or for that matter even an oral notice) is required to terminate the agreements. The agreements came to an automatic end in my view upon the failure of the defendant to pay the balance of the purchase price on 15 October 1983, time being of the essence under cl. 8.

In coming to this finding, I am not unmindful of cl. 14 of the main agreement which provides that all notices under the agreement would have to be in writing. This clause would be applicable in my view only if the agreement provides that a written notice would be required to terminate the agreement, which is not so in this case.

Assuming that Counsel for the defendant was right that a written notice was required, the effect of the plaintiffs' failure to comply, as was rightly submitted would make time no longer the essence of the agreements (see dictum of Sir

Malins V.C. in *Webb v. Hughes* [1870] LR 10 Eq. 281 at p. 286 as approved by Raja Azlan Shah J in *Wong Kup Sing v. Geram Rubber Estate Ltd.* [1969] 1 MLJ 245. In such a situation by the intervention of equity, the plaintiffs would not now be in a position to insist on the strict compliance with cl. 4(b) that the balance sum is paid by 15 October 1983. But that would not relieve the defendant from his obligation under the agreements as he would still have to pay the balance sum within a reasonable time. To date the sum has not been paid. That being so, there would still be a breach on his part which would give the plaintiffs the right to terminate the agreements in any case.

But quite apart from the legalistic aspect of the agreements, on evidence I accept the 1st plaintiff's testimony that he had given the defendant oral notice of termination as this is consistent with the subsequent conduct of the plaintiffs as demonstrated by the letter written by the plaintiffs' solicitor dated 13 May 1985 (exh. P2) which requires the defendant to sign a new agreement by 17 May 1985 failing which the defendant would have to vacate the house. Such a new agreement would not have been required if the present agreements had not been terminated. The letter, it is clear to me presupposes the termination of the previous agreements, as opposed to merely allowing the defendant time to complete the sale on the same terms.

It is also clear that the sale was NOT conditional on the success of the defendant obtaining a loan from a financial institution. Clause 14 must be read as merely permitting the defendant to charge the property for the purpose of financing his purchase only if or when the title was available as the defendant was well aware of the preamble in the supplementary agreement that the two pieces of land on which the house stood was undergoing amalgamation and subdivision when he signed the agreements.

In the event, I must conclude that the defendant was in breach of the agreements and that the plaintiffs have lawfully terminated them.

The Sum Of RM31,000 Paid To The Plaintiffs So Far

Unlike most other conveyancing agreements of this nature the present agreements did not make provision for the forfeiture of the sum of RM31,000 which had been paid by the defendant to the plaintiffs in the event of breach. It was submitted by counsel for the plaintiff nevertheless that the plaintiffs are entitled to forfeit the RM31,000 paid by the defendant as they were in fact payments of deposit towards the purchase of the house and unless such monies are expressed to be non forfeitable, the plaintiffs are entitled to keep them. According to counsel for the defendant however, the money should be returned to the defendant as both the agreements did not specify the payments were deposits.

To settle this issue it may be necessary to rely on the meaning ascribed to the word by Cotton LJ. In the leading case of *Howe v. Smith* [1884] 27 Ch. D 89 at p. 95 which was approved in the Privy Council case of *H.G. Warren v. Tay Say Geok & Ors.* [1965] 31 MLJ 44. It reads as follows:

> The deposit, as I understand it, and using the words of Lord James (*viz.* in *Ex parte Barrell* LR 10 Ch. 512), is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit.

Accepting Cotton LJ's dictum as correctly stating the usage of the word, it is clear that 'deposit' carries no legal meaning but is used merely to describe any money that had been paid towards the purchase price of a property to which a purchaser who repudiates the sales and .purchase agreement has no right to recover. It follows that there is no necessity to stipulate in the agreement that the payments are deposits for the purchase of the house so long as it is clear that they are intended as part payments – as in the instant case. It is also clear to me that unless the agreements so provide that they are recoverable, (which they do not in the instant case), the payments would have to be forfeited to the plaintiffs,

Damages For Wrongful Occupation Of The House

A proper notice had been served on the defendant by the solicitor for the plaintiffs by the letter dated 24 May 1985 advising the defendant to vacate the house by 28 May 1985. It follows therefore that he should be liable in damages (to be assessed by the registrar) to the plaintiffs from this date until he vacates the house.

Order

The plaintiffs' claim is allowed as prayed. The defendant's counter-claim is dismissed with costs.

There will be a further order that the defendant be given 12 months to vacate in view of the logistics involved in finding and moving to a new accommodation.